

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Lanner
118491

FILE: B-205903

DATE: May 25, 1982

MATTER OF: Information Marketing, Inc.

DIGEST:

1. Challenge against agency's award of fiscal year 1982 microform library services requirements on sole-source basis is actually a challenge against pace at which the agency is taking steps to competitively procure the required services. The record shows that because the agency's prior fiscal year contract was about to expire and there would be a significant disruption of services, the agency temporarily extended the contract until a competitive solicitation could be issued. In view of magnitude of agency requirements, GAO concludes that agency needed time to develop exact technical specifications for a solicitation which would fulfill the precise needs of all of the agency's field activities.
2. While it is the policy of the Small Business Act, 15 U.S.C. § 631, et seq. (1976), to award a fair portion of Government contracts to small business concerns, there is nothing in the act or implementing regulations that mandates this particular procurement be set aside for small businesses.
3. Protests against agency awards of contracts for microform library services in fiscal years prior to 1982 are untimely and not for consideration on the merits by GAO.

Information Marketing, Inc. (IMI), protests the award by the Defense Logistics Agency (DLA) of contract No. DLA006-82-F-1000 to Information Handling Services (IHS). The contract was awarded on a sole-source basis to IHS for services involving the storage and retrieval of technical information in microform libraries.

IMI raises the following grounds of protest:

(1) DLA awarded the entire fiscal year 1982 microform information systems requirements to IHS without giving IMI a fair opportunity to compete for those requirements;

(2) DLA violated Federal Property Management Regulation (FPMR) 101-26-408 because it awarded at other than the lowest price available;

(3) DLA violated the Small Business Act, as amended, by failing to overtly seek small business participation in the procurement of microform services; and

(4) DLA has systematically denied IMI the opportunity to compete for the Agency's information storage and retrieval requirements by repeatedly awarding contracts to IHS for its microform services requirements.

For the reasons set forth below, we deny IMI's protest in part and dismiss IMI's protest in part.

BACKGROUND

Both IMI and IHS provide microform library services to the Government under nonmandatory Federal Supply Schedule contracts with the General Services Administration. Essentially, the services offered by IMI and IHS involve the storage and retrieval of technical information on microfilm. For a number of years, DLA has utilized these types of services as an efficient means of maintaining military specifications and standards, Government regulations, United States and international standards, and vendor product information. Until 1975, each activity within DLA individually ordered services it needed. Because a

substantial price discount could be obtained from IHS for its "visual search microfilm file" (VSMF) if all the requirements of Headquarters DLA Library and DLA's field activities were combined, DLA in April 1975 centralized its procurement in order to take advantage of IHS's discount. However, the responsibility for establishing requirements and for determining whether IHS's VSMF would provide the needed service remained with each individual field activity within DLA.

In 1978, an evaluation of IMI's and IHS's systems was performed by the library and financial personnel at Headquarters DLA Library to determine whether the Headquarters DLA Library should continue to use the services of IHS. As a result of the evaluation, it was determined that the VSMF services of IHS should continue to be used. The requirements of those DLA field activities which identified IHS as the contractor they wished to use were also included with the requirements of Headquarters DLA Library.

DLA awarded the microfilm services requirements of its headquarters library and its field activities to IHS in fiscal years 1980 and 1981. In September 1981, IMI complained to DLA regarding its lack of success in not obtaining at least a portion of DLA's requirements for microform library services. Because of IMI's complaint, DLA decided that a cost comparison analysis between IMI and IHS should be performed and that action on fiscal year 1982 requirements should be postponed until the analysis was completed. By letter dated October 8, 1981, DLA requested information to be used in the analysis from both IMI and IHS. The two companies submitted information packages a few weeks later in response to DLA's request.

DLA began to experience difficulties in conducting its price comparison of IMI's services with those of IHS due primarily to incompatibilities in the two companies' various service lines which made direct comparison difficult. Since the fiscal year 1981 order with IHS was about to expire and there was a likelihood of a disruption in service, DLA decided to renew its existing order with IHS for fiscal year 1982 for those service lines for which IMI did not have a comparable line. As to those service lines which were offered by both companies, DLA decided to seek a 120-day

extension of IHS's order during which time the Agency would issue a competitive solicitation and eventually make an award. However, IHS informed DLA that it would be unable to accept a 120-day order because such an order would put IHS in the position of having to offer all other Government agencies the same opportunity to place orders for less than 1 year pursuant to IHS's Federal Supply Schedule contract with the General Services Administration. As a compromise, DLA and IHS entered into a written agreement on November 25, 1981, in which DLA extended its entire order with IHS for 1 more year in return for IHS's promise to waive any termination fees should DLA terminate any portion of the extended order and prepare a competitive solicitation for that portion.

DLA notified IMI of the extension of IHS's order by letter dated December 3, 1981. On December 7, 1981, IMI protested the extension to DLA. Following a determination by DLA on December 21, 1981, that its 1978 evaluation of IMI and IHS was no longer accurate and that a centralized competitive solicitation for all DLA activities was feasible once a thorough technical evaluation of both companies' services had been made, IMI filed a protest with this Office on December 23, 1981.

Fiscal Year 1982 Requirements

IMI asserts that DLA procrastinated on competitively fulfilling its fiscal year 1982 requirements until it had created an "artificial emergency" and then renewed its prior order with IHS. According to IMI, DLA is taking many months to plan and execute what should be a "rather simple" competitive procurement. Further, while IMI acknowledges that DLA has indicated that it will eventually compete the requirement, IMI argues that the delay makes this somewhat cosmetic because the incumbent contractor has a competitive advantage when a continuing requirement is being procured. Thus, IMI believes that IHS will have a significant advantage in any competitive procurement, especially where such procurement will be for only a portion of the fiscal year.

In response, DLA states that when IMI took exception in September 1981 to the procurement procedures for microform library services, it was on the basis that DLA was using as justification for ordering from IHS a 1978 evaluation which was "out-dated." DLA states that in the process of investigating IMI's allegations, the contract with IHS expired and it thus became necessary to award to IHS on an interim basis in order to supply DLA's minimum needs. Since then, according to DLA, a detailed technical evaluation by qualified engineering personnel has been performed on both the IMI and IHS microform systems. This evaluation revealed that IMI could supply some of DLA's microform services needs. Accordingly, DLA indicates that it will issue a competitive solicitation in May 1982 for those needs for the remainder of fiscal year 1982 which can be fulfilled by both IMI and IHS. Notification of the procurement was published in the April 28, 1982, edition of the Commerce Business Daily.

IMI did not decide until September 1981 to aggressively pursue its business with DLA. This was only 2 months before the Agency's fiscal year 1981 order with IHS expired. DLA emphasizes that it has 22 activities which contract for thousands of diverse commodities and which administer military service contracts for weapons systems, goods and services, and property disposal. DLA further emphasizes that it maintains records for more than 600,000 items of Government-owned industrial plant equipment and that it stores all the Department of Defense technical information. Therefore, despite IMI's assertion that the procurement by DLA of microform library services should be relatively simple, we think some time is necessary in order for DLA to develop exact technical specifications and issue a competitive solicitation for these services that would fulfill the precise needs of all of its activities.

We note that IMI is also contending that DLA should not have contracted with IHS in view of the "impropriety" of DLA's past procurement practices involving microform library services. However, we fail to understand how DLA's actions under these past procurements affect the fact DLA had to temporarily extend its fiscal year 1981 microform services order with IHS until a centralized competitive solicitation could be developed for some of

DLA's requirements in this area. The record shows that had DLA failed to temporarily extend its order with IHS, there was a likelihood of disruption in its microform library services.

Award at Higher Prices

IMI contends that DLA did not in the past and has not as of today purchased microform library services to fulfill its needs at the lowest cost to the Government. In support of this contention, IMI provides us with a comparative analysis of IHS's contract prices versus its prices as indicated on the companies' current Federal Supply Schedule contracts. IMI alleges that it is evident from these figures that DLA could have saved a minimum of \$41,410 by coming to IMI for a portion of its fiscal year 1982 requirements.

Where an agency has made an appropriate determination justifying purchase from a higher priced supplier under the Federal Supply Schedule, our Office does not believe a legal objection to the agency's determination is warranted unless the determination is shown to be unreasonable. See Quest Electronics, B-193541, March 27, 1979, 79-1 CPD 205. As indicated above, the justification used by DLA to purchase from IHS in the past was the September 1978 evaluation of IMI versus IHS. Other than allegations that the 1978 evaluation was "factually flawed" and "analytically biased," IMI has given us no explanation as to why this technical evaluation was erroneous. Consequently, we have no basis to conclude that even if IMI's prices are the lowest, DLA should not have purchased its fiscal year 1982 microform library service requirements from IHS.

Small Business Act

IMI asserts that DLA has failed to address its responsibilities under the Small Business Act. IMI calls our attention to the fact that the act requires an agency to aid, counsel and assist small business concerns. IMI further points out that the Defense Acquisition Regulation which implements the Small Business Act, requires agencies to overtly seek out qualified small business concerns for participation in the contracting process and to examine each acquisition in order to determine the extent to which small

business can participate. IMI alleges that DLA has failed to comply with the requirements of the Small Business Act and implementing regulations.

The Small Business Act, 15 U.S.C. § 631, et seq. (1976), as amended, reflects a national policy of furthering the interests of small business concerns and in awarding a fair portion of Government contracts to such concerns. However, there is nothing in the Small Business Act or the implementing regulations which mandates that a particular procurement be set aside for small business. Rather, the decision whether a procurement is to be set aside for small business generally is within the discretion of the contracting agency. Instrument Control Service, B-194503, April 30, 1979, 79-1 CPD 299. Consequently, this Office is generally reluctant to second-guess an agency's decision not to set aside a procurement for small business and has declined to consider protests against such a decision. See Francis & Jackson, Associates, B-190023, January 31, 1978, 78-1 CPD 79, and the cases cited therein. We do note, though, that IMI alleges that "realistically" there are only two sources that can fulfill the microform library services requirements of DLA, IMI and IHS, a large business concern.

Prior Awards

To the extent that IMI takes exception to orders that DLA placed with IHS prior to fiscal year 1982, protests against those orders at this time are clearly untimely filed and not for consideration on the merits under our Bid Protest Procedures, 4 C.F.R. § 21.2 (1981). See Cacciamani Bros., B-194434, July 20, 1979, 79-2 CPD 45.

While IMI did not protest these awards, we point out that DLA still had a duty to seek competition, especially in view of its awareness of the existence of more than one FSS contract for the items. Relying for 3 years on the 1978 evaluation as a sole-source justification brings into question how actively DLA procurement personnel sought competition.

Conclusion

IMI's protest is denied in part and dismissed in part.

William J. Vester
for Comptroller General
of the United States